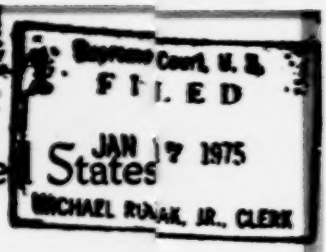
SUPREME COURT, U. S.




# Supreme Court of the United States

October Term, 1974.

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No. 74-679.

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

STOECO HOMES, INC.,

*Respondent.*

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On Petition for Writ of Certiorari.

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## BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

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## I. SUPPLEMENTARY STATEMENT OF THE CASE.

### (a)

The government petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the case of the United States of America v. Stoeco Homes, Inc., entered on May 23, 1974. The opinion of the Court of Appeals is reproduced in Appendix A of the government's petition, and the judgment, in Appendix C.

The single question which the government desires to present on review, if granted, is stated in the petition as follows:

> "Whether a developer of a community adjacent to a navigable waterway must obtain a federal permit under

> Section 10 of the Rivers and Harbor Act of 1899, 33 U.S.C. 403, to excavate navigable lagoons extending the waterway to his lot fronts."

The question presented for review clearly fails to conform to Rule 23, 1(c), in that it is not expressed in the terms and circumstances of the case.

In view of the limited nature of the question the government proposes to present, it appears unnecessary to recite all the particular facts in the case at hand, but some facts beyond those given in the petition will be introduced as we proceed, for we are, of course, concerned with a particular controversy between the litigating parties, involving specific facts and circumstances.

**(b)**

An error on page 2 of the government's petition must first be noticed and corrected. It is there stated that in 1951 Stoeco obtained a federal permit "to excavate two canals *on* a filled salt marsh it owned in Ocean City, New Jersey." (Emphasis added.) If in place of the preposition "on" the preposition "to" is substituted, the error will be corrected. Stoeco intended to build a residential lagoon development on its tract of land, being the tract referred to in the government's petition as a "filled salt marsh." The first step would be to provide access ways from the channel of Back Thorofare (a part of Great Egg Harbor which, in turn, is a part of the Intercoastal or Inland Waterway) of sufficient depth to accommodate the boats of those who might become purchasers or occupants of houses in the development. In 1951 Stoeco obtained a federal permit to create two such access ways from the channel of Back Thorofare to its land, by deepening the Thorofare to a depth of 10 feet and for the required width. A considerable distance separates the two access

ways. From the landward terminus of one of the ways, Stoeco then excavated *on* its tract of land a lagoon it named Sunny Harbor. This lagoon and its immediate environs do not figure in this case, and drop out of view. From the landward terminus of the other access way, Stoeco in the year 1955 excavated *on* its tract of land a lagoon it named South Harbor, extending, for its greater part, in a straight line to a point near Bay Avenue. The permit did not cover any lagoon *on* Stoeco's land.

**(c)**

After the two access ways and the lagoon known as South Harbor were dug, and some bulkheading along South Harbor was installed, activities were suspended for a period of years, and when resumed Stoeco prepared a certain plan, which bears date April, 1965, for the area with which this case is concerned, entitled "Subdivision of Stoeco—Riviera Plan No. 6, Ocean City, Cape May County, N. J.," and at the trial it was introduced in evidence, and the expression "Plan Six" became a convenient term to identify the situs of the controversy.

Plan Six shows a number of proposed lagoons, sometimes referred to as finger lagoons, extending at right angles to South Harbor. Most of them run from Tennessee Avenue on the left side of the map to South Harbor, and continue on under the same names to Spruce Road on the right side of the map. By the time this litigation arose, all but two of these finger lagoons had been excavated and much bulkheading had been done. The two lagoons with which this case is concerned are known as Midway Harbor and Salvador Harbor, and indeed not the whole of these lagoons, for the segment of each of them to the right (on the map) of South Harbor had been completed before the Army Corps of Engineers intervened. To the left of South Harbor (on the map), that is, from South Harbor

to Tennessee Avenue, the proposed Midway Harbor had not been excavated at all, and only about 50 feet of Salvador Harbor had been excavated, and both lagoons remain in that condition because of the injunction.

Also because of the injunction, much bulkheading (to retain the earth of the sides of the lagoons in place) remains to be done, and removal of silt that has fallen at some places to the bottom of South Harbor and several other lagoons, or carried there by movement of water, during the excavation and dredging operations, remains to be done. In view of the limited scope of the question the government intends to present if certiorari is granted, we will avoid as much as possible any further reference to unfinished bulkheading and the silting and shoaling which have occurred and may occur if Stoeco is prevented from installing the bulkheads, for Stoeco has been prevented, by the injunction entered in the district court, from completing the bulkheading and removing the silt.

## II. REASONS FOR DENYING THE WRIT.

### (a)

Stoeco does not deny that it entered upon the excavation of South Harbor and the lagoons radiating from it without applying to the Army Corps of Engineers for a permit, or obtaining a permit from the Secretary of the Army. It believed that no federal permit was required for the proposed lagoons *on* its land.

In preparation for an earlier residential lagoon development, not far from the present premises in question, Stoeco had submitted to the Engineers a sketch showing the work it intended to do. By letter dated January 19, 1949, found in the footnote

on page 7a of the petition for certiorari, the District Engineer advised Stoeco as follows (second paragraph):

> "Inasmuch as no construction is contemplated channelward from the existing bulkhead at the locality and the dredging for a boat basin is shoreward from the line of the bulkhead, no Department of the Army permit for the work will be required."

With respect to South Harbor and the lagoons which radiate from it, they also lie inside the bulkhead line in that locality. From the evidence on the part of the government it appears that no federal government harbor lines (which include bulkhead lines) had ever been established in that area, and the government contended that the words "outside established harbor lines" as used in Section 10 should be read to mean "outside harbor lines established by federal authority," and that lines established by state or local authority are, in the present connection, of no significance, and are entitled to no recognition. The court of appeals dealt with this contention at some length (Appendix A, page 6a to page 10a under the heading "The §10 Violation"). We agree with the view and conclusion there expressed. Moreover, it appears to us, from the Question Presented in the petition for certiorari, that it is at least doubtful that the government persists in its contention.

**(b)**

Much of the reasoning employed by the government in support of its application for certiorari manifests failure to observe and give due and close attention to the language of the statute it invokes, namely, Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403.

The excavation of the two lagoons remaining undone in its project will not create an "obstruction * * * to the navigable capacity of any of the waters of the United States." In fact, and obviously, rather than obstructing the navigable capacity, it enlarges horizontally the range of navigability, for boats will then be able to sail where now is land.

Nor do the lagoons answer to the description of wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures.

But it may be said that upon the completion of the excavations (or upon progress toward completion) the water that enters will alter or modify the course, location, condition, or capacity of South Harbor and other lagoons, and, by extension of effect, Back Thorofare, the Intercoastal Waterway, Great Egg Harbor, and beyond to the open sea, or the channel of any navigable water, by lowering the water level of all these bodies of water resulting from the diversion of the quantity of water to fill the two lagoons to a depth of 10 feet. The plane measurements of each lagoon are 117 feet wide, and about 650 feet long. But the diversion will be made once only, and will not recur, and the source of the water diverted and its replenishment will be the nearby Atlantic Ocean. The theoretical or mathematical lowering of the water is utterly too small to effect the course, location, condition, or navigability of the connecting bodies of water which occupy the short and unimpeded distance between the lagoons and the ocean. The doctrine of de minimus can hardly ever be better exemplified and applied. Infinitestimal magnitudes may most appropriately, in practical affairs, be ignored.

(c)

At page 7 of the petition for certiorari it is said: "Similarly, as we have shown, Stoeco's excavation of lagoons changes the condition of the navigable waters to which they connect, through (among other things) washouts, deposits, and changes in traffic."

As to washouts, they occasionally occur by a break in the walls of the retaining dikes during the course of hydraulic dredging, and the deposits are those (1) which occur when some of the earth released by the break slides back or is carried back into the excavation until the break is repaired, and (2) the fines which do not sink behind the bikes, but flow back whence they came through the water run-off pipes, all as normally happens during a hydraulic dredging operation. Installation of bulkheads will permanently prevent the washouts and the deposits, and the dredging up and removal of the silt will correct the condition of shoaling at several places heretofore created, but the injunction imposed by the district court has prevented Stoeco from applying the remedies.

Like complaints were made on page 6 of the petition for certiorari, in this language:

> "Excavation of finger lagoons adjoining a harbor is as much an alteration of that body of water is is construction of a pier creating a similar increase of docking facilities. Indeed, it is a greater alteration because it physically changes the configuration of the water and bank, and, as the present case shows, creates a danger of washouts and other obstructions to navigation and lowered water quality."

Washouts and obstructions to navigation (shoaling, we presume) are temporary, until the work is completed, and eliminated

by bulkheading and dredging, as above shown. And the same can be said of lowered water quality, if any, caused by the silting.

**(d)**

At several places in the petition for certiorari, intimations, not at all veiled, are made that Section 10 can validly be utilized as an instrument to limit boat traffic. See page 7 ("changes in traffic"), page 8 ("these waterways are subject to heavy navigation"), and page 9 ("thus to increase the boat traffic"). We see nothing in Section 10 which suggests a design by its authors to discourage or limit boating upon the country's waters, and it can be said with confidence that in 1899 Congress foresaw no redundancy of boats on the waterways. If and when public welfare requires restrictive measures, we can be sure that any enactments to that end will be explicit and direct.

**(e)**

The government contends that the decision of the court of appeals in the case at hand is not in accord with applicable decisions of the Supreme Court, or conflicts with decisions of other courts of appeal. It also contends that the decision conflicts with the decisions of two district courts. But as to the latter, see Supreme Court Rule 19, 1(b), from which it is apparent that ordinarily, at least, certiorari will not issue in order to review a discordance between a court of appeals and a district court.

**(f)**

We now examine the decisions cited by the government in support of the reasons it assigns for granting the writ.

The case of *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U. S. 655 (1973), was a penal proceeding for violation of §13 of the Rivers and Harbors Act of 1899, by discharging or depositing certain industrial wastes in navigable waters. The case has nothing in common with the case at hand, and apparently was cited only because the opinion contained this statement taken from earlier cases, that "the history of this provision and of related legislation dealing with our full-flowing rivers 'forbids a narrow, cramped reading' of §13," attributed to the two decisions referred to by the government on page 7 of its petition, namely, *United States v. Standard Oil Co.*, 384 U. S. 224, and *United States v. Republic Steel Corp.*, 362 U. S. 482. No one can fail to agree with the admonition against a narrow or cramped reading of any remedial statute. The decision of the court of appeals in the instant case, however, by no meaus was the product of that kind of reading of Section 10.

In the case of the *Sanitary District of Chicago v. United States*, 266 U. S. 405 (1924), the Sanitary District had been authorized, pursuant to law, by the Secretary of War, to withdraw from Lake Michigan, by means of an artificial canal, up to 250,000 cubic feet of water per minute, but withdrew as much as from 400,000 to 600,000 cubic feet a minute. The United States brought suit to enjoin the excessive withdrawal, alleging that it had lowered and would lower the level of the water of all the Great Lakes (except Lake Superior) and their associated rivers, including the Niagara River and the St. Lawrence River. An injunction issued, and the Supreme Court affirmed. The case differs too greatly from the instant case to be offered here. In the first place, the diversion of the water from the Lake would be continuous and go on forever. In the case at hand, the diversion would be a single event, and not ever repeated, for the system in the cited case was open at both ends, while here the system is closed at the end of the lagoons, with

no outlet for the water to flow beyond and away. Additionally, of course, and as already observed, in relation to the immensity of the other bodies of water comprising our system, the water here withdrawn cannot, except in a mathematical context, be regarded as lowering the level of the waters, and cannot even in that context be conceived as impairing navigability of any portion of that system by any boat fashioned by man.

The case of *United States v. Joseph G. Moretti, Inc.*, 478 F. 2d 418 (5th Cir. 1973), cited by the government, rather than being similar to the instant case is directly opposite, and the decision here does not conflict in principle with the decision in that case. In that case the developer dumped a huge quantity of earth material into navigable water in order to form building lots. In the case at hand the developer (Stoeco) desires to excavate and remove land in order to extend navigability, as heretofore remarked.

The case of *United States v. Perma Paving Co.*, 332 F. 2d 754 (2d Cir. 1964), cited by the government, is irrelevant to the issue the government desires to present as disclosed by the Question Presented. There by overloading a dump adjacent to navigable waters, the ground was caused to give way, and a large quantity of earth or fill to be pushed or fall into the water, to the impediment of navigation. Although in the case at hand, in the course of the hydraulic dredging of lagoons, but unintentionally, some earth materials did fall back into the already dug lagoons and caused some shoaling, as previously explained, Stoeco desires to remove it and eliminate the shoaling, but has been prevented by the stringent injunction imposed by the district court. Indeed, in our brief filed with the court of appeals, we asked for relief from the permanent injunction as follows:

> (3) Revision of the injunction so as to permit the defendant to complete all the bulkheading not already done in and along the existing lagoons and Tennessee Avenue;

(4) Revision of the injunction so as to permit the defendant to dredge out the sediment which fell into South Harbor and Caymen Harbor (and any other lagoon) and caused shoaling as the result of defendant's dredge and fill operation, and so to restore the bottoms to their regular depth.

At page 8 of the petition for certiorari the government calls attention to two cases decided by district courts in 1974 with which the decision of the court of appeals in the case at hand is said to conflict. In the opinion in each case the facts are but meagerly given. In the first case, *United States v. Warren C. Wichard*, E.D.N.C., No. 797, it appears that the defendant, without a federal permit, excavated two canals on his property and connected them with the Pamlico River, a navigable river, thereby diverting water from it. Although it is not so stated, we think it permissible to infer that (as in the above case of *Sanitary District v. United States*) water would flow continuously from the river into the canals, and the water would therefore be irretrievably lost to the river forever, and in time a substantial change in the condition of the river would ensue. If for no other reason, that case and the present case differ too significantly for a conflict of decision to be perceived. In the second of the cited cases, *United States v. Edward W. Mitchell*, D.S.C., Civil No. 73-1125, it appears that the defendant, without a federal permit, excavated a canal in the bottom of Lake Marion (presumably a navigable body of water) beginning at a point more than 900 feet below the line of the normal level of the lake, and had extended the canal shoreward and inland of the usual boundary or shore line of the lake. The court ordered the defendant to refill and restore to normal that portion of the canal from a designated point below the shore line and beyond, to

the inland place of ending of the canal. In the case at hand, the proposed creation of the two new lagoons will not entail any excavation of or from the bottom of any existing navigable waters, and so, likewise, no conflict of decision can be seen.

## III. CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated, January 8, 1975.